

FILED  
Court of Appeals  
Division III  
State of Washington  
1/25/2018 2:24 PM

**NO. 35379-6-III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

---

STATE OF WASHINGTON,

Respondent,

v.

**WINDY SCHATZ,**

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KLIKITAT COUNTY

The Honorable Randall C. Krog, Judge

---

**BRIEF OF APPELLANT**

---

LISA E. TABBUT  
Attorney for Appellant  
P. O. Box 1319  
Winthrop, WA 98862  
(509) 996-3959

## TABLE OF CONTENTS

	Page
<b>A. ASSIGNMENT OF ERROR.....</b>	<b>1</b>
The trial court erred in adding a 24 month school bus route stop enhancement to Ms. Schatz’s sentence when the evidence did not prove, and the court did not find, there was a school bus route stop at Klickitat and Putman on February 23, 2017, as charged in count 1.....	1
<b>B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.....</b>	<b>1</b>
1. Whether the proof was inadequate and the school bus route stop enhancement imposed on count 1 was error when there was (1) no evidence the Klickitat and Putman stop existed on the February 23, 2017, incident date and (2) the court did not include in its written trial findings of fact and conclusions of law that the stop existed on that day?.....	1
<b>C. STATEMENT OF THE CASE.....</b>	<b>1</b>
1. Procedural Facts.....	1
a. Charges and suppression motion.....	1
b. Jury trial waiver and verdicts.....	6
c. Sentencing.....	6
2. Trial testimony.....	8
<b>D. ARGUMENT.....</b>	<b>13</b>
The evidence at trial fails to prove that a school bus route stop on Klickitat and Putman existed on February 23, 2017.....	13

a.	The state is burdened with proving a school bus rote stop existed on the actual date of the offense.....	13
b.	The state failed to prove the bus rote stop existed on February 23, 2017.....	14
c.	The enhancement must be stricken from Ms. Schatz’s sentence.....	15
E.	CONCLUSION.....	16
	CERTIFICATE OF SERVICE.....	17

## TABLE OF AUTHORITIES

	Page
<b>Washington Supreme Court Cases</b>	
<i>State v. Alvarez</i> , 128 Wn.2d 1, 904 P.2d 754 (1995) .....	13
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983) .....	14
<i>State v. Bencivenga</i> , 137 Wn.2d 703, 974 P.2d 832 (1999).....	14
<i>State v. Ferrier</i> , 136 Wn.2d 103, 960 P.2d 927 (1998).....	2, 3, 6
<b>Washington Court of Appeals Cases</b>	
<i>State v. Clayton</i> , 84 Wn. App. 318, 927 P.2d 258 (1996).....	16
<i>State v. Fiser</i> , 99 Wn. App. 714, 995 P.2d 107 (2000) .....	14
<i>State v. Hennessey</i> , 80 Wn. App. 190, 907 P.3d 331 (1995).....	14
<i>State v. Prestegard</i> , 108 Wn. App. 14, 28 P.3d 817 (2001) .....	14
<b>Federal Cases</b>	
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)5, 6	
<b>Statutes</b>	
RCW 69.50.401.....	13
RCW 69.50.408.....	8
RCW 69.50.435.....	13
RCW 9.94A.525 .....	7
RCW 9.94A.533 .....	13
<b>Other Authorities</b>	
CrR 3.5 .....	2
CrR 3.6 .....	2

### **A. ASSIGNMENT OF ERROR**

The trial court erred in adding a 24 month school bus route stop enhancement to Ms. Schatz's sentence when the evidence did not prove, and the court did not find, there was a school bus route stop at Klickitat and Putnam on February 23, 2017, as charged in count 1.

### **B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

Whether the proof was inadequate and the school bus route stop enhancement imposed on count 1 was error when there was (1) no evidence the Klickitat and Putman stop existed on the February 23, 2017, incident date and (2) the court did not find in its written trial findings of fact and conclusions of law that the stop existed on that day?

### **C. STATEMENT OF THE CASE**

#### **1. Procedural Facts**

##### *a. Charges and suppression motion*

The state charged Windy Schatz by second amended information with two counts of delivery of methamphetamine (counts 2 and 3) and one count of possession of methamphetamine with intent to deliver (count 1). CP 11-14. All three of the incidents were said to have occurred on February 23, 2017. CP 11-13. Each count also alleged the incident occurred within 1,000 feet of a school bus route stop. CP 11-13.

Pre-trial, Ms. Schatz moved to suppress methamphetamine found on the person of her girlfriend, Ashley Barrett<sup>1</sup>, but attributed to Ms. Schatz. CP 1-4; RP<sup>2</sup> 9-101. Ms. Schatz argued the police failed to provide *Ferrier*<sup>3</sup> warnings prior to searching her bedroom and the lack of the warnings tainted subsequently obtained evidence. CP 24; RP 9-101.

The court heard the CrR 3.6 and CrR 3.5 hearings simultaneously. RP 9-101. The state presented testimony from members of the Goldendale Police Department. RP 10-77. Ms. Schatz relied on the officers' testimony to support her position. RP 77-78.

Tom Barrett lived at 229 West Putman in Goldendale. RP 10-11. On February 23, 2017, Chief Reggie Bartkowski went to the home to investigate a rumor that drugs could be purchased there. RP 10-11.

Mr. Barrett was home when the police arrived and he gave police permission to search the house. RP 11. He was, however, reticent to allow the police to search the upstairs bedroom shared by his daughter, Ashley, and her girlfriend, Windy Schatz. RP 11. While the police were

---

<sup>1</sup> Ashley Barrett is referred to by her first name for the sake of clarity.

<sup>2</sup> The verbatim report of proceedings (RP) is one long volume.

<sup>3</sup> *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998)

talking to Mr. Barrett, Ms. Schatz and Ashley arrived in their truck and joined the group on the front porch. RP 11-12.

Per Officer Kelsey Shelton, she read *Ferrier* consent warnings to Mr. Barrett from a pre-printed form. RP 63-65. The warnings advised Mr. Barrett he did not have to consent to the search, he could limit the scope of the search, and he could stop the search at any time. RP 65. Ms. Schatz and Ashley were within a seven foot radius during the reading. RP 13-14. Mr. Barrett agreed to the search and signed the form. RP 11, 14-15, 65.

The police did not search the house. RP 34. Instead, the police turned their attention to the two women and talked to them about searching the upstairs bedroom. RP 12, 16-18. The women said there were no drugs in the bedroom and agreed to go upstairs with the officers. RP 16, 18.

Ashley went upstairs first accompanied by Chief Bartkowski. RP 16. Before heading upstairs, Chief Bartkowski told Ashley she did not have to consent to the search, she could limit the scope of the search, and she could terminate the search at any time. RP 17. Ashley indicated she understood and she limited the search by telling Chief Bartkowski she and Ms. Schatz had their own side of the bedroom and he could not search Ms. Schatz's side. RP 16.

The police searched no portion of the bedroom. RP 17. Instead, Ashley produced a “meth” pipe and showed Chief Bartkowski marijuana and a bong. RP 17, 35.

Chief Bartkowski testified that before going upstairs with Ms. Schatz, he told her she did not have to consent to the search, she could limit the scope of the search, and she could terminate the search at any time. RP 17-18. Chief Bartkowski went upstairs with Ms. Schatz but did not search the bedroom. RP 18.

Ms. Schatz told Chief Bartkowski there was methamphetamine in her purse and that her purse was in the truck. RP 18. She went to the truck, retrieved the purse, and handed it to Sergeant Smith. RP 36. Ms. Schatz said she did not want to go back to prison and talked to Chief Bartkowski about working as a confidential informant. RP 20. Chief Bartkowski was interested and they agreed to meet at the Goldendale airport in a half hour to discuss specifics. RP 22.

Sergeant Smith took the purse to the police department and searched it. RP 36. He found no methamphetamine in the purse. RP 22, 36. Sergeant Smith and Chief Bartkowski returned to the residence and confronted Ms. Schatz. RP 22, 38. Ms. Schatz was surprised there were no drugs in the purse. RP 23. Chief Bartkowski ordered Ms. Schatz



detained. RP 23. Officer Leo Lucateros took Ms. Schatz outside, placed her in handcuffs, and advised her of her *Miranda*<sup>4</sup> rights. RP 51-52.

As officers were talking to Ms. Schatz outside, Ashley was standing inside near a window. Ms. Schatz yelled at Ashley not to cover for her, to give the police the methamphetamine, and to not lie. RP 39, 56. Officer Shelton went into the bathroom with Ashley. Ashley removed packaged methamphetamine from her person. RP 67-68. Officer Shelton took the methamphetamine and handed it off to Sergeant Smith who placed it in evidence. RP 40.

Ms. Schatz was formally arrested and taken to jail. RP 57, 69. Officer Shelton advised Ms. Schatz of her *Miranda* rights. Ms. Schatz wrote a statement. RP 69-73. The statement was admitted as Exhibit 2. RP 73. Suppression Motion, Exhibit 2, Supplemental Designation of Clerk's Papers.

The court denied the suppression motion and entered written findings of fact and conclusions to support its reasoning. RP 91-101; CP 20-26. The court held Ms. Schatz's non-*Mirandized* statements were admissible as they were not required because Ms. Schatz was not yet in

---

<sup>4</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)

custody when she made statements. Once she was under formal arrest and in custody, *Miranda* warnings were given, Ms. Schatz waived her rights, and voluntarily made statements to include the statement she wrote at the jail. RP 91-101; CP 20-26.

The court also found Mr. Barrett, Ashley, and Ms. Schatz had all been given adequate *Ferrier* warnings but as there was no search of any part of the house, *Ferrier* warnings had not been required. RP 91-101; CP 20-26.

*b. Jury trial waiver and verdicts*

Ms. Schatz signed a written waiver of her jury trial right. CP 10. The court also discussed the waiver with her. RP 104-05.

After listening to testimony and reviewing the evidence, the court found Ms. Schatz guilty of count 1, possession of methamphetamine with intent to deliver, and count 2, delivery of methamphetamine. The court acquitted her of count 3, delivery of methamphetamine. The court also found count 1 occurred within 1,000 feet of a school bus route stop but found the same was not proven on count 2. RP 337-45.

*c. Sentencing*

At sentencing, Ms. Schatz challenged the legal comparability of three 2011 Oregon convictions to like Washington offenses. RP 349-53.

The court found the Oregon unauthorized use of a motor vehicle and attempting to elude a police vehicle not comparable to Washington offenses and as such could not be included in Ms. Schatz's offender score RP 353, 361.

Ms. Schatz withdrew her argument on the lack of comparability of the Oregon possession of methamphetamine. RP 353.

Ms. Schatz agreed she had an offender score of nine. RP 354. Community Corrections Officer Rhonda Nielsen testified Ms. Schatz was on community custody supervision on February 23, 2017. RP 357-58. The court added an additional point to the offender score for Ms. Schatz being on community custody at the time of the offenses.<sup>5</sup> RP 361-62; CP 28.

Ms. Schatz requested a drug offender sentencing alternative (DOSA). RP 354. The parties agreed Ms. Schatz received a DOSA sentence on a 2009 Clark County sentence. RP 360. The court denied Ms. Schatz's request for a second DOSA sentence. RP 362.

---

<sup>5</sup> RCW 9.94A.525(19)

The court imposed a 144 month sentence<sup>6</sup> comprised of 120 months for the two convictions plus an additional 24 months for the school bus route stop enhancement. RP 363; CP 44. Ms. Schatz's criminal history includes 4 prior convictions for possession of methamphetamine. CP 42.

Ms. Schatz appeals all portions of her judgment and sentence. CP 39-52.

## 2. Trial testimony

On February 23, 2017, Echo Nelson texted Ms. Schatz about buying methamphetamine. RP 114. Ms. Schatz replied by text and agreed to meet Ms. Nelson at the Goldendale IGA Fresh Market. RP 115. Later that day, Ms. Schatz met Ms. Nelson in parking area of the market. RP 116. Ms. Nelson gave her \$60 and Ms. Schatz gave Ms. Nelson a "ten" of what Ms. Nelson believed was methamphetamine. RP 116-17. The money paid to Ms. Schatz was for both money she owed Ms. Schatz and for the "ten." RP 116-17.

---

<sup>6</sup> A person convicted of a second or subsequent conviction under the Uniform Controlled Substances Act may be imprisoned for up to twice the term otherwise authorized. RCW 69.50.408. Delivery of methamphetamine and possession of methamphetamine with intent to deliver are both class B felonies with a 120 month statutory maximum.

Ms. Nelson snorted the substance and it had “some effect” on her. RP 118, 125. She did not use very much of it though. RP 118-19. The balance of what she did not use was destroyed as Ms. Nelson discovered she was pregnant and vowed to stop using. RP 118.

Ms. Nelson’s testimony formed the basis for count 2. RP 316; CP 12.

Later that day, Ms. Schatz and Ashley returned to their Putman Road home only to find Chief Bartkowski and other police officers on the front porch. RP 146. Ms. Schatz told the police she had methamphetamine in her purse and the purse was in the truck. RP 154. Ms. Schatz retrieved the purse from the truck and gave it to Sergeant Smith. RP 185. Ms. Schatz talked to Chief Bartkowski about working as a confidential informant. RP 155. Chief Bartkowski was interested in making an arrangement. RP 156.

Sergeant Smith took the purse to the police station and searched it but found no methamphetamine. RP 185. Chief Bartkowski returned to the Putman home and confronted Ms. Schatz about not finding methamphetamine in the purse. RP 160-61, 186-87. Ms. Schatz was detained on the porch. RP 161. Ashley was in the house near a window.

RP 247. Ms. Schatz yelled at Ashley not to lie and not to take the fall for her - Ms. Schatz's - methamphetamine. RP 247.

Ashley and Officer Shelton went into the bathroom and Ashley removed a baggie from her person. RP 264-65. The baggie contained three individual packages of a crystalline substance. RP 210. The baggie also contained a small plastic spoon. RP 210. Sergeant Smith believed the spoon was of the type used for filling individual baggies with methamphetamine as opposed to a spoon someone might employ to ingest methamphetamine. RP 210.

The police also located \$375 on Ms. Schatz. RP 248. She told the police \$60 of it was from the sale of methamphetamine to Echo Nelson. RP 249.

Each package later tested positive by Washington State Patrol forensic scientist Jason Trigg as containing methamphetamine. RP 291. The total weight of the methamphetamine was 8.1 grams. RP 291. This was the information the state relied on in charging count 1, possession with intent to deliver. RP 321-24.

The state theorized that Ms. Schatz must have transferred the methamphetamine to Ashley at some point. RP 17. This formed the basis

for count 3, delivery of methamphetamine, for which the court concluded Ms. Schatz was not guilty. RP17.

Once under arrest, and at the jail, Ms. Schatz provided a 4 page written statement to Officer Shelton. In her written statement, she provided details about the methamphetamine delivery to Echo Nelson at IGA and a few instances of having sold methamphetamine in the past. RP 17, 275. She also wrote about having the methamphetamine in her purse when she came home to find the police talking to Tom Barrett on the porch. RP 274-77.

Ms. Schatz argued in trial that the evidence failed to establish a corpus delicti for the charged offenses. RP 164, 165, 271. The court disagreed and allowed into evidence all of her statements to include the 4 page statement she wrote at the jail. RP 17, 275.

Ashley did not testify.

Ms. Schatz did not testify and presented no witnesses in her defense. RP 309.

On an unspecified date, Sergeant Smith went to the Goldendale School District bus barn and spoke with a person he identified as John Holm. RP 201. Mr. Holm showed him a paper with the “bus stops on it.” RP 201. Sergeant Smith determined the closest bus stop to the West

Putman house was mid-block in the 300 block of West Putman. RP 200-01.

On March 2, Sergeant Smith used a rolling device to measure from the front door of the Barrett house at 229 West Putman Street to mid-block in the 300 block of Putman and decided it was under 300 feet. RP 199, 234. This speculative testimony was strenuously objected to. RP 199, 201-06, 220, 224, 229-31, 234. In allowing in the estimated distance, the court also considered Sergeant Smith's history as a bow hunter estimating distances and his skills in measuring distances as it related to using the rolling device over many years to measure distances at accident scenes. RP 234-35. Smith put an "x" on Exhibit 4, an aerial photo, to mark the location of the Barrett home. RP 201.

The state presented testimony from Clay West, the Goldendale School District transportation supervisor. RP 296. West identified a school bus stop near Klickitat and Putman on an aerial map of the city. RP 298-98. He noticed the "x" placed on the map by Sergeant Smith and agreed that was a "school bus route area." RP 299. He did not testify whether there was a bus route stop there on February 23, 2017. RP 295-303.



The court's written findings of fact and conclusions of law to support its trial findings do not specify the location of any school bus route stop in existence on February 23, 2017. CP 15-19.

#### **D. ARGUMENT**

**The evidence fails to prove the existence of a school bus route stop on Klickitat and Putman on February 23, 2017.**

The evidence cannot support the school bus route stop enhancement. No evidence proved the existence of a school bus route stop on the February 23, 2017 incident date. As the evidence is insufficient, the school bus route stop enhancement must be reversed and Ms. Schatz resentenced without the enhancement.

*a. The state is burdened with proving a school bus route stop existed on the actual date of the offense.*

The school bus route stop penalty is authorized by RCW 69.50.435 which provides that any person who violates RCW 69.50.401 by possessing with intent to deliver a controlled substance within one thousand feet of a school bus route stop designated by the school district may be penalized. The specific penalty is a 24 month sentencing enhancement. RCW 9.94A.533(6).

A defendant may raise a sufficiency argument for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). It is the

state's burden to prove each element of a sentence enhancement beyond a reasonable doubt. *State v. Hennessey*, 80 Wn. App. 190, 194, 907 P.3d 331 (1995).

Evidence will support a verdict on an enhancement only if, when viewed in the light most favorable to the state, any rational trier of fact could have found the elements of the enhancement beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 670 P.2d 646 (1983). In determining whether the quantum of proof exists, the court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the state's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001). In making this determination, both circumstantial evidence and direct evidence are equally reliable. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999).

*b. The state failed to prove the bus stop existed on February 23, 2017.*

In an effort to provide proof beyond a reasonable doubt the existence of the school bus route stop enhancement, the state relied on

the testimony of Sergeant Smith and Goldendale School District transportation supervisor Clay West. Sergeant Smith testified to seeing a list of bus stops provided to him by bus barn employee John Holm. RP 201. But Sergeant Smith did not testify that list addressed school bus stops as of February 23, 2017. Similarly, transportation supervisor West testified to there being a bus stop on West Putman but not that it existed at that location on February 23, 2017. Both Sergeant Smith and West looked at an aerial photo of Goldendale but an aerial photo documents only the topography of the city and says nothing about the location of school bus stops on a certain date.

The purported delivery occurred on February 23, Sergeant Smith got his information about school bus stops from Holm on March 2, and West's trial testimony occurred on May 18. No one testified as to the location of the school bus stops three months earlier on February 23. Moreover, West did not explain how bus stops are created or designated, for how long, and what happens if a bus stop no longer serves any children.

*c. The enhancements must be stricken from Ms. Schatz's sentence.*

The state failed to prove beyond a reasonable doubt the school bus stop existed as of the February 23, 2017, incident date. This court should

reverse and dismiss the bus stop enhancement with prejudice and remand for resentencing. The remedy for insufficient evidence of an enhancement is remand for imposition of the sentence without the enhancement. *State v. Clayton*, 84 Wn. App. 318, 320, 927 P.2d 258 (1996).

**E. CONCLUSION**

Ms. Schatz's case should be remanded to strike the school bus enhancement and for resentencing.

Respectfully submitted January 23, 2018.

A handwritten signature in dark ink, appearing to read 'LISA E. TABBUT', with a long horizontal line extending to the right.

---

LISA E. TABBUT/WSBA 21344  
Attorney for Windy Schatz

## **CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares:

On today's date, I filed the Brief of Appellant to (1) Klickitat County Prosecutor's Office, at davidq@klickitatcounty.org and paapeasl@klickitatcounty.org; (2) the Court of Appeals, Division III; and (3) I mailed it to Windy Schatz, DOC#843852 Washington Corrections Center for Women, 9601 Bujacich Road NW, Gig Harbor, WA 98332.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed January 23, 2018, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal stroke extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Windy Schatz, Appellant

# **LAW OFFICE OF LISA E TABBUT**

**January 25, 2018 - 2:24 PM**

## **Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35379-6  
**Appellate Court Case Title:** State of Washington v. Windy Anne Schatz  
**Superior Court Case Number:** 17-1-00016-9

### **The following documents have been uploaded:**

- 353796\_Briefs\_20180125142228D3924810\_0457.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was Windy Schatz Brief of Appellant.pdf*

### **A copy of the uploaded files will be sent to:**

- davidq@klickitatcounty.org
- paapeals@klickitatcounty.org

### **Comments:**

---

Sender Name: Lisa Tabbut - Email: ltabbutlaw@gmail.com  
Address:  
PO BOX 1319  
WINTHROP, WA, 98862-3004  
Phone: 877-856-9903

**Note: The Filing Id is 20180125142228D3924810**